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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 50

UNITED STATES, *Petitioner*,

v.

THE HOWARD P. FOLEY COMPANY, INC., a Corporation.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION.

ALEXANDER M. HERON,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Claims (R. 16-20) is not yet officially reported.

JURISDICTION.

Petitioner has invoked the jurisdiction of this Court under Section 3(b) of the Act of February 13, 1925, as amended. The judgment of the Court of Claims was entered on December 3, 1945 (R. 20).

QUESTION PRESENTED.

The question presented is whether an electrical contractor is entitled to the recovery of damages attributable to inexcusable delays occasioned to it by the Government through the latter's failure, after requiring the contractor to proceed with the work, to complete the necessary preparatory work on the site upon which the work was to be done, and as a consequence of which the contractor's performance was extended over a period of time more than double the time fixed under the terms of the contract.

STATEMENT.

The work required under the contract was fairly ordinary in character, a field lighting system for an airport (R. 3). The contract required that the work be commenced as soon as practicable and be completed within one hundred and twenty days from the date of notice to proceed (R. 3). Notice to proceed was received eighteen days after the contract was entered into (R. 9, Fdg. 2). Respondent proceeded with its work immediately upon receipt of the notice and prosecuted it to completion. (R. 10, Fdg. 3).

The Government had undertaken to construct the field itself by means of hydraulic dredging (R. 14-15, Fdg. 5; R. 11, Fdg. 4). It was attempting to effect completion of this work in one year, although it would ordinarily take from four to five years for stabilization (R. 14, Fdg. 5). Its engineers knew from the beginning that they were confronted with a problem of quick stabilization (R. 14, Fdg. 5). The length of time necessary to make the fill, stabilize the material, and do the grading and paving was not accurately anticipated by the Government's engineers (R. 15, Fdg. 5). The contracting officer, who made findings extending the time for performance of the contract, also found that the contractor who was to do the paving on the site was delayed by the Government's failure to release portions of the site to it (R. 11, 13, Fdg. 4).

Neither change order nor stop order was ever issued. No adjustment in contract price was made.

Soon after the work commenced it became apparent that the Government would be unable to complete its part of the work in time, and that the contractor would consequently be prevented from completing in the contract period (R. 10, Fdg. 4). The contractor was obliged to continue its work in an irregular fashion, with its supervisory force and equipment always standing by (R. 15, Fdg. 6), and completed it 277 days after the date of notice to proceed (R. 10, Fdg. 3), which was more than double the 120 days which the contract allowed for the work (R. 9, Fdg. 2). The court below, as well as the contracting officer, absolved the contractor of any responsibility in connection with the delay, and both found the source of the delay to have been the Government's failure to make the site available for the work (R. 10-14, Fdg. 4). This failure in turn arose directly from the fact that the stabilizing and preliminary operation took more time than had been anticipated (R. 10-14, Fdg. 4).

REASONS FOR DENYING THE WRIT.

The court below did not hold, as petitioner contends, that the Government had the obligation under the contract to make it possible for the contractor to complete its work in 120 days. What the court below held was that the petitioner had the obligation of not making it *impossible* for the contractor to complete its work in the contract time by failing to carry out those parts of its obligation which were both necessary and preliminary to the contractor's work. The language of the opinion below must be read against the background of the facts which were before the court. The interpretation put upon it by petitioner is extravagant.

Petitioner appears to contend that it was free to have taken years in its preparatory work, even after notice to proceed was given the contractor, and that it was under no limitation or requirement with respect to the length

of time it might compel the contractor to remain at the site with its supervisory forces and equipment, proceeding in a retarded and erratic fashion. Obviously there is a relation between the petitioner's preparatory work and that to be performed by the contractor. No other meaning can be drawn from the contract than that when the notice to proceed was issued by the Government, it carried with it the assurance that the Government would do what was necessary on its part so as not to prevent the contractor's completion.

It is to be observed that the contract did not compel the issuance of the proceed order at any particular time nor was the Government obliged to issue it until it was ready to do so. But when the Government issued the proceed order, the requirements of the contract were set in motion and the contractor was bound to complete the work within 120 days thereafter.

The delays were of a character similar to those involved in *Henry Ericsson Company* v. *United States*, — C. Cls. — (decided October 1, 1945, cert. den. March 5, 1946, No. 701) where there was a failure by the government to give necessary approvals, and in *Largura Construction Co.* v. *United States*, 88 C. Cls. 531, where the government failed to furnish necessary models.

It will also be observed that no change order or stop order was issued, as was the case in *United States* v. *Rice*, 317 U. S. 61. In *United States* v. *Rice*, upon which petitioner relies heavily, sub-surface or latent conditions were discovered at the site shortly after the work commenced. As a consequence alterations in the plan of the work were ordered and extensions of time for performance, as well as adjustments in the contract price, were made. The contention of the Government in the Rice case was stated to be (317 U. S. 64):

> "The government contends, as it did in the *H. E. Crook Co. Case, supra*, that the change in specifications resulting in delay was not a breach of the con-

tract, but in accordance with its terms; that the extent of its obligation for permitted changes was fixed by the contract; and that for delay the government was required to do no more than grant an extension of time."

There is no such situation here. The Government simply found that more time was required for the performance by it of its own preliminary work. While the court below referred to the time limit of 120 days as being a mistaken calculation (R. 17),[1] it seems more likely that the mistake involved was that of the estimate by the Government for its own part of the work, particularly since the record shows that the contractor's work could ordinarily be done in 120 days, but that the Government's delays prevented it (R. 10-14, Fdg. 4). It did not undertake to stop the respondent's work nor did it issue any change orders. Had it done so the very costs which constitute the damages to the contractor in this case would have been avoided. The contractor could have suspended its operation and saved the payroll cost which continued to run on. It could have had the use of the same personnel and of its equipment elsewhere during that period of time when both labor and equipment were in great demand. Instead the Government elected to require the contractor to proceed in an inefficient and uneconomical manner necessitating the retention of its personnel, as well as equipment, on the site of the work during the entire period from the time of the proceed notice until final completion of its work.

Petitioner also relies upon *United States* v. *Blair*, 321 U. S. 730. In that case the contractor, Blair, made a claim for damages based upon delays occasioned him by another contractor who was performing work at the same site under an independent contract with the Government. The

[1] Petitioner suggests, for the first time, in a footnote to its petition that the contract time of 120 days may represent a mutual mistake. If so, respondent would be entitled to rescission and increased payment for work done on the basis of an extended period of performance.

delay did not prevent Blair from finishing within contract time but did prevent his finishing within a time considerably less than the contract requirement, which he might otherwise have done. The decision there was that the Government owed no obligation to require the co-contractor to enable Blair to finish within any time in advance of the limit fixed in the contract. That decision seems fairly to recognize that while no duty rests upon the Government to enable the contractor to complete in advance of the time fixed, there nevertheless is a duty not to interfere with the performance of the contractor nor to impede it so that it cannot finish within the time fixed.

H. E. Crook Co. v. *United States*, 270 U. S. 4, likewise arose out of a situation in which the government had let two contracts for performance of work at the same site. The contest involved the contract for the installation of mechanical equipment in the building which was being erected under the other contract. The contract provisions found in that case are wholly different from those found in the case at bar. The completion date of both contracts was expressly stated to be approximate only (270 U. S. 6) and these expressions were an important factor in the decision of that case. It was pointed out in the opinion that the Government could not have been expected to lay itself open to responsibility for the acts of another contractor. For it to have done so would in effect have made it a guarantor or surety for the other contractor's performance. But in the case at bar, it is the Government's own failure which caused the delay. In both the Crook case and the Blair case, the claimants knew that their own operations were dependent upon performance by another independent contractor. Here the respondent was entitled to assume that the Government would perform in good time the part of the work which it was executing.

Cases like *Maryland Dredging Co.* v. *United States*, 241 U. S. 184, and *Day v. United States*, 245 U. S. 159, involving

delays attributable to submerged obstacles and floods do not give any support to petitioner's case.

CONCLUSION.

For the foregoing reasons it is submitted that the petition should be denied.

Respectfully,

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Attorneys for Respondent.